FILED
DEC 8 1921
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

Original No. 24.

OCTOBER TERM, 1921.

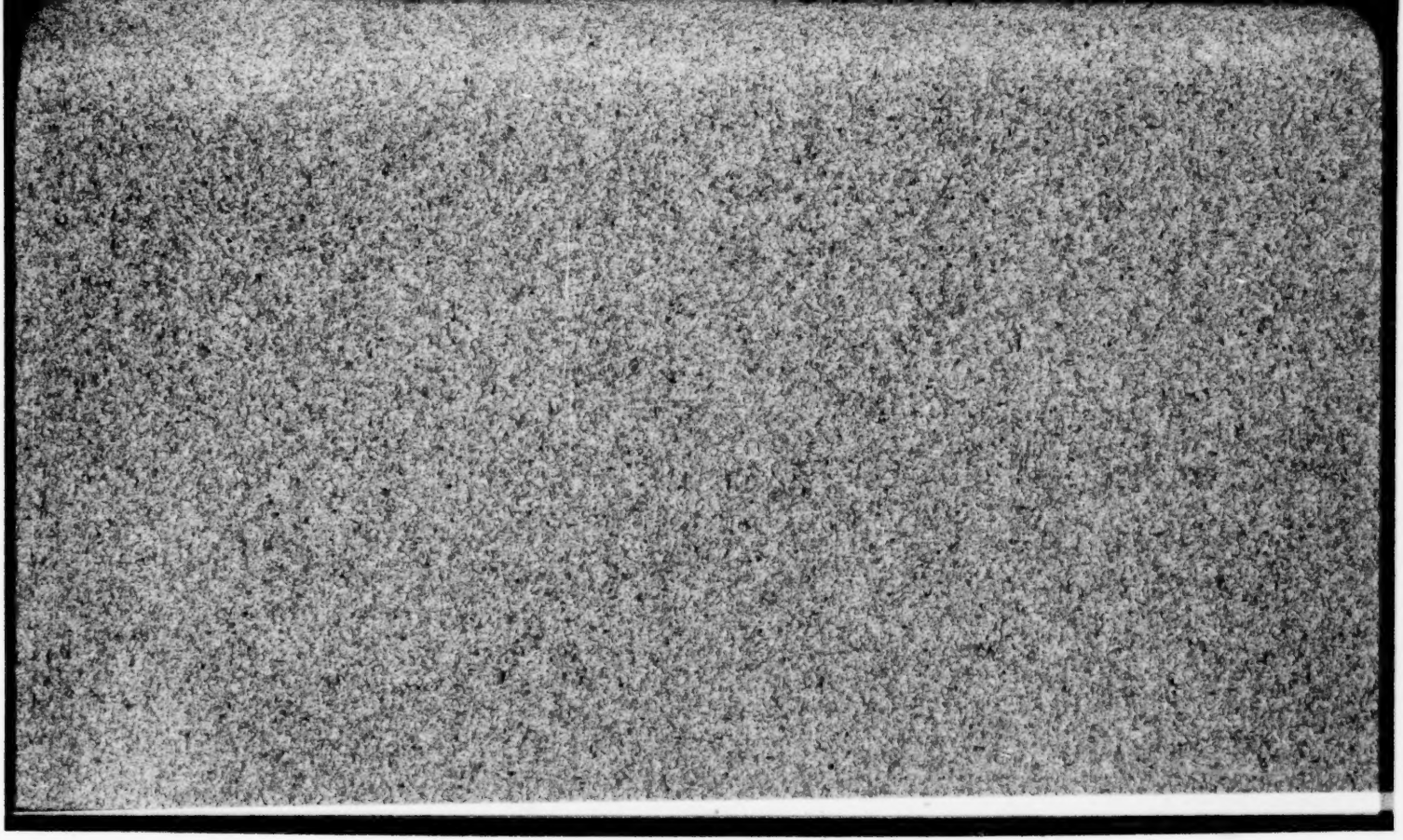
STATE OF TEXAS,

vs.

INTERSTATE COMMERCE COMMISSION AND RAILROAD LABOR BOARD.

BRIEF FOR AMICUS CURIAE.

N. A. Steedman,
E. B. Perkins,
Daniel Upthegrove,
Solicitors for the St. Louis Southwestern Ry. Co. of Texas.



INDEX.

Page

STATEMENT 2

ARGUMENT 2

1. The Supreme Court of United States has no jurisdiction because this is not a suit between a State and citizens of another State 2
2. Since this suit is not a controversy between the State of Texas and citizens of other States, the original jurisdiction of the Supreme Court cannot be invoked by reason of the alleged constitutionality of certain provisions of the Transportation Act 4
3. The Attorney General of the State of Texas has no authority to institute or prosecute this suit 9
4. When a state becomes a litigant, it takes the same position as a private party and is bound by the same rules of law and equity 16
5. The sovereign rights of a State are not included within the rights which a State, as a litigant, may put in issue in the case 18
6. Powers of Congress 32

LIST OF CASES CITED.

CASES: Page

Bankers' Trust Company vs. T. & P. Railway Company, 241 U. S 295, 309 3
Cherokee Nation vs. Ga., 5 Peters, p. 1 25
Cohen vs. Virginia, 6 Wheaton, p. 407, 5 L. Ed. 292 16
Erie Railroad vs. New York, 233 U. S. 671 38
Firstoe vs. Leon & H. Blum, 92 Texas, p. 80 17
Georgia vs. Staunton, et al., 73 U. S., p. 71 24
Gibbons vs. Ogden, 9 Wheaton, p. 1 35
H. E. & W. T. Ry. Co., vs. U. S., 234 U. S. 342 33
Louisiana vs. Texas, 176 U. S., p. 1 28
McCullough vs. Maryland, 4 Wheaton, 316 35
Minnesota Rate Cases, 230 U. S. 352 34
Mondou vs. N. Y. N. H. & H. R. R. Co., 223 U. S., p. 1 35
Muskrat vs. U. S., 219 U. S. 346 30
Northern Pacific Ry. Co. vs. Washington, 222 U. S. 370 37
Oklahoma vs. G. C. & S. F. Railway, 220 U. S. 290 20
Oklahoma vs. A. T. & S. F. Ry. Co., 220 U. S. 276 29
Osborne vs. Bank, 9 Wheat. 819 22
Railroad Tax Cases, 136 Fed. 233 15
Southern Railway vs. Railroad Commission of Indiana, 236 U. S. 439 34
State of California vs. Southern Pacific Company, 157 U. S. 229 6
State vs. Penoyer, 25 L. R. A., p. 862 17
T. & P. Ry. vs. Rigsby, 241 U. S. 33 34
Wisconsin vs. Pelican Insurance Co., 127 U. S. 365 19

IN THE

Supreme Court of the United States

Original No. 24.

OCTOBER TERM, 1921.

STATE OF TEXAS,

vs.

INTERSTATE COMMERCE COMMISSION AND RAILROAD LABOR BOARD.

BRIEF FOR AMICUS CURIAE.

This Brief is presented by N. A. Stedman, E. B. Perkins and Daniel Upthegrove, Solicitors for the St. Louis Southwestern Railway Company of Texas, in support of the motion filed by the Defendants to dismiss the Bill of Complaint, with the

request that they be permitted to file the same for the reason that the questions presented in this cause are of vital interest to said Railroad Company.

STATEMENT.

The statement submitted by Counsel for the Interstate Commerce Commission summarized the Bill of Complaint so fully and completely that it is unnecessary for us to do more than to adopt their statement.

In the progress of their brief and argument, we will make such reference to the allegations and the Bill of Complaint as may be necessary to illustrate the argument presented.

ARGUMENT.

I.

The Supreme Court of the United States Has No Jurisdiction in This Cause Because This Is Not a Suit Between a State and Citizens of Another State.

By Subdivision 2 of Section 2, Article 3, of the Constitution of the United States, it is provided that the Supreme Court shall have original jurisdiction in all cases in which a State shall be a party; and by Subdivision 1 of the same Section and Article, the judicial power of the United States

extends, among other things, to controversies between two or more states; between a State and citizens of another State, and between a State, or the citizens thereof, and foreign States, citizens or subjects. Clearly the only claim that this is a case to which the judicial power extends that can be made with any semblance of reason is that it is a controversy between a State and citizens of another State. With the view doubtless of showing that the Interstate Commerce Commission and the Railroad Labor Board are persons against whom suit may be brought, it is alleged in the bill in this case that each of them is a body corporate. Granting that each of them is a corporation, each owes its existence to an Act of Congress and is consequently a Federal corporation. Accordingly, under the rule that a corporation is a citizen of the government by which it is created, neither the Interstate Commerce Commission nor the Labor Board is a citizen of another State, but each is a citizen of the United States. Decisive of this question is Bankers Trust Company vs. T. & P. Railway Company, 241 U. S. 295, 309, in which it was held that the T. & P. Railway Company, by virtue of its Federal charter, is not a citizen of any State, but is, on the contrary, a citizen of the United States. This being true, we submit is fatal to the original jurisdiction of the Supreme Court of the United States in this case.

II.

Since This Suit Is Not a Controversy Between the State of Texas and Citizens of Other States, the Original Jurisdiction of the Supreme Court of the United States Cannot Be Invoked Because of the Alleged Unconstitutionality of Certain Provisions of the Transportation Act.

Doubtless, the provision of the constitution extending the judicial power to controversies between a state and citizens of another state was inserted to avoid the necessity of a state's resorting, for the assertion of a cause of action in its favor against a citizen of another state, to the courts of the other State, by reason of the danger of the want of impartiality of the courts of the other state. If it be suggested that the objection may be met by giving the inferior Federal Courts in the States of which the adverse parties are citizens original jurisdiction of such controversies, the answer is, that to require a sovereign State to submit itself to the jurisdiction of inferior Federal Courts would not comport with its dignity, in consonance with the statement in Article 81 in the Federalist that, "In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal"; and accordingly provision was made for the exercise by the Supreme Court of original jurisdiction in such cases. A cause of ac-

tion may exist in favor of a state, because of the violation, affecting its justiciable rights, of the Constitution, against one of its own citizens as well as against a citizen of another state, and the result of the assumption by the Supreme Court of original jurisdiction, on the ground of the alleged unconstitutionality of a Statute, would be to authorize a state to sue one of its own citizens in the Supreme Court when a violation of the Constitution is involved. But in litigation of any character with one of its citizens, a State would be at no disadvantage by reason of lack of impartiality of its own courts, and there would therefore be no more reason for its going into a Federal Court for the assertion of its rights than there would be for either of two opposing private litigants. This is stated in recognition of the right of either a State or a private litigant having a cause of action arising under the Constitution or laws of the United States to go into a Federal Court initially for the enforcement of the cause of action, but as to that matter, the State and the private litigant are upon the same plane, and either has the choice of a local State Court or an inferior Federal Court as the tribunal of original jurisdiction, with the right of either to have the question tested by the Supreme Court upon writ of error after an adverse decision by the trial court. When the controversy is between citizens of different states, the citizens of another State may sue originally in the Federal Court to secure him against local prejudice, and likewise a State for the same reason may go into the Federal

Court to enforce a right against a citizen of another State, but, if it desires to sue in a Federal Court because of the danger of prejudice in local courts in another state, out of consideration for its dignity as a sovereign State it shall not be compelled to enter an inferior tribunal but may go into the Supreme Court. In either case, the jurisdiction rests upon the character of the parties, and not at all upon the nature of the case, as will be hereinafter more fully shown.

Turning to the language of the Constitution, it is to be observed that by Subdivision 1 of Section 2 of Article 3, the judicial power extends, among other things, to all cases in law and equity arising under the constitution, and to all cases involving controversies between a State and citizens of another State, and that by Subdivision 2 of the same section and article, it is provided that among other cases, of which the Supreme Court shall have original jurisdiction, are those in which a State shall be a party. While the question under consideration has not arisen in a case exactly similar to the case at bar it did arise and was decided in accordance with the views herein expressed in the case of State of California vs. Southern Pacific Company, 157 U. S. 229, and we submit the decision in that case as decisive of this question. There the State of California brought an original suit in the Supreme Court of the United States against a corporation, which was a citizen of another State. After determining that a citizen of the State of California,

not sued, was an indispensable party, the Court proceeded to decide the case just as if the citizen of the State had been made a defendant, and concluded that the suit could not be maintained, since if any defendant is a citizen of the same State as the plaintiff, the original jurisdiction of the Supreme Court does not attach. In its reasoning, the Court discussed the very question we are considering in the following language:

> "By the first paragraph of section two of article III, of the Constitution it is provided that 'the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; . . . to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states . . .' And by the second clause that 'in all cases affecting ambassadors other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction . . .' The language, 'in all cases in which a state shall be a party,' means in all the cases above enumerated in which a state shall be a party, and this is stated expressly when the clause speaks of the other cases where appellate jurisdiction is to be

exercised. This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. In one description of cases the character of the parties is everything, the nature of the case nothing. In the other description of cases the nature of case is everything, the character of the parties nothing."

Addressing itself to the contention that the jurisdiction did not rest exclusively upon a controversy between the State of California and a citizen of another State, but that it was one arising under the Constitution by reason of presenting the question whether a law involved impaired the obligation of a contract, the court, treating the case in the same manner as if the omitted party were before the court, observed:

"We are aware of no case in which this court has announced the conclusion that power is conferred on Congress to authorize suits against citizens of other states joined with citizens of the same state as that of which plaintiff is a citizen to be originally commenced in, or to be removed to, the circuit courts, as arising under the Constitution on the ground indicated, where there is no sep-

arable controversy or the citizens of plaintiff's state are indispensable parties, but we are not called on to consider that question, or whether any Federal question is involved, since the original jurisdiction of this court in cases between a state and citizens of another state rests upon the character of the parties and not at all upon the nature of the case. If by virtue of the subject-matter, a case comes within the judicial power of the United States, it does not follow that it comes within the original jurisdiction of this court. That jurisdiction does not obtain simply because a state is a party. Suits between a state and its own citizens are not included within it by the Constitution; nor are controversies between citizens of different states."

III.

The Attorney General of the State of Texas Has No Authority to Institute and Prosecute This Suit, Since His Duties and Powers, as Defined in the Constitution and Laws of the State of Texas, Do Not Embrace the Bringing and Prosecution of a Suit of This Character.

By Section 22 of Article 4 of the Constitution of Texas, the Attorney General is authorized to represent the State in all suits and pleas in the

Supreme Court of the State in which the State may be a party; to inquire into the charter rights of all private corporations and from time to time, in the name of the State, to take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power, or demanding, or collecting any species of tax, tolls, freight or wharfage, not authorized by law; to seek, when sufficient cause exists, the judicial forfeiture of the charters of corporations; to give legal advice to the Governor and other executive officers, and to perform such other duties as may be required by law. By Article 4413, Revised Civil Statutes, it is made his duty to prosecute and defend all action in the Supreme Court or the Court of Appeals in which the State may be interested and to perform such other duties as may be prescribed by the Constitution and laws. In Article 4418a, it is made his duty to advise the Governor, Heads of Departments, State Boards, Legislative Committees, County Auditors, District and County Attorneys, etc., to advise as to the issuance of bonds, and to institute escheat proceedings in certain cases. By Articles 4427 and 4428, it is made his duty to seek judicial forfeiture of the charters of private corporations, and to inquire into the charter rights of all private corporations and to take the same action in the courts as is provided in the Constitution. By Article 498, it is made his duty to bring suit to forfeiture the charter of Surety Companies under

certain circumstances. By article 500, it is made his duty to sue Surety Companies for the benefit of the beneficiaries. By Article 507, it is made his duty to bring suit for penalties against persons or corporations violating the blacklisting law. By Article 1030, it is made his duty to bring suit for the forfeiture of the Charter of a Public Utility Corporation, under certain circumstances. By Article 1202, it is made his duty to institute quo warranto or other proper proceeding against insolvent incorporations. By Article 1510, it is made his duty under certain circumstances, to bring suit to forfeit charters of bond investment companies and for receivers. By Article 1186, it is made his duty to sue private corporations for penalties for failing to make reports, under certain circumstances. By Article 1180, it is made his duty to bring suits to escheat lands held by corporations in violation of law. By Article 20, it is made his duty to bring suit to escheat lands held by aliens in violation of law. By Article 1313ii, it is made his duty, under certain circumstances, to bring suit to enjoin Building Loan Associations from doing further business and for the appointment of receivers therefor. By Article 3824, it is made his duty to bring suit against foreign Express Companies, under certain circumstances, for refusing to permit the Railroad Commission to inspect records. By Article 4692, it is made his duty to enjoin the use of premises for carrying on Bucket Shops. By Article 4690,

it is made his duty to enjoin the use of premises for immoral purposes. By Article 5249, it is made his duty, under certain circumstances, to institute proceedings for the condemnation of land required by the State for public purposes. By Article 3934½c, it is made his duty to bring suit to enjoin the use of certain premises without fire escapes. By Article 6398, it is made his duty to institute quo warranto proceedings against persons who have usurped offices, as well as Associations acting as corporations without being incorporated, and against railroad companies for charging extortionate rates. By Article 6425, it is made his duty to bring suits against railroad corporations for failing to keep their general offices and machine shops in the State, for the forfeiture of their charters, and for the recovery of penalties. By Article 6424, it is made his duty to bring suit against railroad corporations for any violation of the laws requiring the keeping of offices and machine shops in the State, the keeping of repair shops in the State, the keeping of certain records in the State and the submission of annual reports to the Comptroller or Governor. By Article 6566, it is made his duty to bring suit against any railroad company or receiver for penalties for failing to equip locomotive engines with electric headlights. By Article 6569, it is made his duty to bring suit against railroad companies or receivers for penalties for failing to provide derailing devices. By Article 6575, it is made his

duty to bring suit against any railroad company or receiver for penalties for operating trains without certain crews. By Article 6578, it is made his duty to bring suit against any railroad company or receiver for penalties for failing to provide ash pans. By Article 6585, it is made his duty to bring suit against any railroad company or receiver requiring employees to work more than the specified length of time. By Article 6673, it is made his duty to bring suits against railroad companies or receivers for penalties for failing or refusing to perform any duty imposed by the Commission Act, or for failing or refusing to obey any lawful requirement, order, etc., of the Railroad Commission. By Article 6691, it is made his duty to bring suits against railroad companies or receivers for failing to furnish or exchange cars and transport and deliver same as required by the Railroad Commission. By Article 6705 it is made his duty to bring suit against any railroad company or receiver for neglecting or refusing to comply with any order of the Railroad Commission designating certain kinds of railroad crossings. By Article 6708, it is made his duty to bring suit against any railroad company or receiver for failing to obey an order of the Railroad Commission, relating to the use of more than one locomotive in the operation of trains. By Article 6714, it is made his duty to bring suit against any railroad company or receivers for penalties for failing to equip locomotives, tenders

and cars with grab irons, hand-holds and foot stubs. By Article 6370f, it is his duty to bring suit on bonds for compliance for contracts for public printing. By Article 4780, it is made his duty to bring suits, under certain circumstances, for taxes against Life Insurance Companies. By Article 7404, it is made his duty to bring suit against corporations for failing to pay franchise taxes and for penalties. By Article 7388, it is made his duty to bring suit to recover penalties for failing to pay taxes upon gross receipts. By Article 7424, it is made his duty, under certain circumstances, to bring suit against any person or corporation required to report intangible assets for taxation to the State Tax Board for failing to make such report. By Article 7806, it is made his duty to sue for penalties for the violation of the anti-trust law of the State.

The foregoing enumeration of the duties of the Attorney General is not all-embracing, since to refer to every Statute placing on him the duty to bring suits would serve no useful purpose, but it is sufficient to indicate that the legislative construction of the Constitution is that he has only such powers as are conferred by the Constitution or by Statutes. It is hardly necessary to refer to anything but to the language of the Constitution to determine the powers of the Attorney General, since by that instrument he is authorized to bring the actions specified and to "perform such other duties as may be required by law," which evinces the intention to restrict his

authority to what the Constitution and Legislature prescribe. It may be remarked that while the various Statutes to which we have referred impose duties upon the Attorney General, his powers are derived from his duites, under the statement in the case of State vs. S. P. R. R. Co., 24 Texas 80, 118, that, "It is the duty imposed by law on the officer, who must bring the suit, that constitutes the right to bring and maintain it." In the case of Day Land and Equity Company vs. State, 68 Texas 526, 533, is the following language, referring to the duties of the Attorney General and District Attorneys in Texas: "Finding no express law which authorizes either of those officers to institute and maintain the suit, it would be difficult to hold that either of them had the implied power resulting from the general grants of power or imposition of duties."

It is true that in that case it was held that the Attorney General had the right to bring the suit, but it was because of the fact that the Legislature had recognized his power in suits of that kind. In Railroad Tax Cases, 136 Federal 233, 236, the court held that, since the Constitution of the State of Arkansas provides that the Attorney General "shall perform such duties as may be prescribed by law," the Statutes of the State must be consulted to ascertain what duties the Legislature has seen proper to impose on that officer. Failing to find any Statute authorizing the Attorney General to bring the kind of suit there involved, the Court decided.

IV.

When a State Becomes a Litigant it Takes the Same Position as a Private Party, and is Bound by the Same Rules of Law and Equity.

In passing upon the question of what is a suit, Chief Justice Marshal in the case of Cohen vs. Virginia, 6 Wheaton, at page 407, 5 L. Ed. 292, said:

> "What is a suit? We understand it to be the prosecution or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' 'The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror to be 'the lawful demand of one's right.' Or, as Bracton and Fleta express it, in the words of Justinian, 'jus prosequendi in judicio quod alicui debetur.'' Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right."

It will be observed that the substance of this quotation is that a suit in law or equity is the pursuit of something to which the Complainant

is entitled. A State can become a party to a suit and can pursue something to which it has a right, but when it does so, it takes the same position as to the law and the rights that can be presented that is occupied by and may be presented by an individual. This is recognized by the Supreme Court of Texas.

> "Announcing the law on this subject, the Supreme Court of the State in the case of Firstoe vs. Leon & H. Blum, 92 Texas Reps. at page 80, said:
>
> > 'A clear understanding of the relation in which the state stands to the purchasers in these contracts will greatly facilitate a proper solution of the questions upon which this case depends. It is well settled that so long as the State is engaged in making or enforcing laws or in the discharge of any governmental function it is to be regarded as a sovereign and has prerogatives which do not appertain to the individual citizen, but when it becomes a suitor in its own courts or a party to a contract with a citizen the same law applies to it as under like conditions governs the contracts of an individual.' "

This announcement of the law by the Supreme Court of Texas is sustained by the opinion of the Supreme Court of Oregon in State vs. Penoyer, —— Oregon, 25 L. R. A., page 862. The court, in closing a very able opinion, uses the following language:

"The contention of the state is that the court must interpose by the extraordinary remedy of injunction, and render nugatory the solemn enactment of a coordinate branch of its government, as in contravention of the fundamental law, without at the same time alleging any facts showing wherein and in what manner the state would be damnified, and without exhibiting any good or sufficient reason for the exercise of such extraordinary power. A mere suggestion that the act complained of is unconstitutional, and that the legislature has exceeded its constitutional limitations, is insufficient to call into requisition a court of equity. 'The court, as such, has no supervisory power or jurisdiction over public officials or public bodies.' People vs. New York Canal Board, supra.

"The state, when equitable relief is sought, such as is prayed for in the present proceeding, must, like private individuals, bring itself within the known and fixed rules of equitable interference before the court will grant its petition."

V.

Under the Rules Established by the Foregoing Decisions, the Sovereign Rights of a State Are Not Included Within the Rights Which a State as a Litigant May Put in Issue in a Case.

A careful examination of the Bill of Complaint in this cause discloses that there are no other rights which the State attempted to put in issue, except

the sovereign rights; the allegations contained in the Bill with reference to the property rights of the State, as to its ownership of a railroad, its business as a shipper, etc., are merely incidental to its sovereign rights. These property rights are not followed up or elaborated so as to show that their infringement is a matter submitted to this court, and if they were so followed up, it would at once appear that this court did not have jurisdiction of a subject matter involved under the uniform holding made by this court as to its original jurisdiction.

Wisconsin vs. Pelican Ins. Co., 127 U. S. 365, 32 L. Ed. 239.

In that case this court, at pages 293-4, L. Ed. 244, said:

> "From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a State and citizens of another State, or of a foreign country, does not extend to a suit by a State to recover penalties for a breach of her own municipal law. This is shown both by the nature of the cases in which relief has been granted or sought, and by Acts of Congress and opinions of this court more directly bearing upon the question."

As to other allegations contained in the Bill of Complaint with reference to property damages to

the citizens of the state generally, the holdings of this court have been that the State could not maintain a suit upon this ground.

In the case of Oklahoma vs. G. C. & S. F. Ry., 220 U. S. 290, 55 L. Ed. 469, this court, at page 301, L. Ed. 474, said:

> "But there is another ground which is equally fatal to the claim that this court may give the relief asked by an original suit brought by the state. In the provisions of the Constitution relating to the judicial power of the courts of the United States, it is provided, as we have seen, that 'in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction.' In Oklahoma vs. Atchison, T. & S. F. R. Co. No. 13, Original, just decided (220 U. S. 277, ante, 165, 31 Sup. Ct. Rep. 134), it was held that a state could not invoke the original jurisdiction of the Court, by suit on its behalf, where the primary purposes of the suit was to protect its citizens generally, against the violation of its laws by the corporations or persons sued; that the above words, 'those in which a state shall be party' were not to be so interpreted as to embrace suits of that kind.' "

From the foregoing we conclude that the State as a litigant occupies the same position as an individual or corporation litigant, and cannot base a suit on its sovereign rights. However, it may be contended that the State may elect to submit its sovereign rights to the consideration and decision

of the judicial branch of the government, and when it does so and the allegations show that these rights have been or will be infringed upon, that the State is entitled to be heard, and upon the establishment of its contention, will be entitled to relief by injunction. In fact, we understand that the Bill of Complaint in this cause is based upon that theory. Accepting that as a theory of the complaint made by the state, we submit the following proposition:

THE EXERCISE OF THE JUDICIAL FUNCTION DOES NOT EXTEND TO THE ADJUDICATION OF POLITICAL OR SOVERIGN RIGHTS WHERE THE PRIVATE RIGHTS OF PERSONS OR PROPERTY ARE NOT INVOLVED.

Section 2, Article III of the Constitution of the United States provides that

> "The judicial Power shall extend to all Cases, in Law and in Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, etc."

The case at bar, being a suit in equity, must present a "case" in equity to be cognizable by this court.

A question respecting the Constitution and Laws of the United States, to become a case, must be presented by a party who asserts his rights under this Constitution or these Laws, in such form as is cognizable by and can be acted on by a court. Osborne

vs. Bank 9 Wheat. 819; 6 L. Ed. 223; Cherokee Nation vs. Ga. 5 Peters 1.

In the case at bar, the Complainant sues in its soverign capacity for itself and "representatively on behalf of its citizens in their soverignty"; and alleges that the suit is of a civil nature arising under the Constitution and Laws of the United States, and is for the purpose of enjoying the Defendants from enforcing certain sections of the Transportation Act of 1920.

The Bill then, in a very careful way, alleges the provisions of the Constitution and Laws of the State of Texas with reference to railroad companies, and the provisions of the Constitution of the United States restricting the powers of the United States and reserving to the state the powers not delegated.

It then summarizes the provisions of the Transportation Act of 1920 which are claimed to infringe upon the rights of the Complainant, and likewise summarizes the provisions of the Constitution of the United States which are claimed to be violated thereby.

It is unnecessary to enumerate or even condense the various allegations contained in the Bill with reference to the foregoing matters for the reason that it is apparent and cannot be denied that the rights set up by the Complainant are the soverign rights of the State; and the injuries alleged to be threatened or suffered by the Complainant are injuries resulting from a violation of its soverign rights; and incidentally, it is alleged that injuries

are suffered by its citizens by reason of the violation of the soverign rights of the State.

Our construction of the Bill of Complaint is supported by the prayer of the Bill wherein Complainant prays

> "That the so-called Transportation Act of 1920, and particularly Section 300 to 316, inclusive, 402 to 407, 416 and 418, 402, subdivisions 18 to 22, 407, subdivisions 1 to 8, 422, subdivisions 1 to 18, 439, subdivisions 1 to 11, be declared invalid, unconstitutional and void; and that the Defendants named herein and constituted bodies corporate be declared and adjudged illegal and without statutory or constitutional authority; and that any and all laws or parts of laws, directing, empowering, regulating the creation, appointment, qualification and terms of service and granting authority to defendants named and the several members thereof be declared invalid, unconstitutional and void and the acts, orders and all things authorized to be done or performed by defendants be declared void, invalid and of no force and effect and without force of law, or if any part of said Transportation Act of 1920 be held to be constitutional, the remaining sections and portions thereof and all other laws in aid thereof be declared invalid, unconstitutional and void; and that the defendants and each of them be enjoined and restrained from enforcing all or such invalid and unconstitutional portions of the laws herein complained of in the State of Texas in such a manner as to interfere with the regulation of internal affairs of the complainant and the enforcement

of its Constitution and its constitutional and valid laws, regulations and contracts, and the constitutional rights of its citizens."

It will be observed that Complainant prays this Court to protect the soverign rights of the State of Texas, by enjoining the Defendants from proceeding to perform acts authorized by Acts of Congress, on the ground that said Acts are unconstitutional.

The grounds of complaint against the acts of Congress enumerated in the foregoing prayer of the bill, as set forth in the bill, are that they authorized the defendants herein to do and perform governmental functions which belonged exclusively to the State of Texas by reason of its sovereign, political rights reserved to it by the Constitution of the United States.

The authority of this court to consider such a question was fully considered and determined in the case of Georgia vs. Stanton, et al., 73 U. S. (6 Wallace 50), 18 L. Ed. 721, wherein a bill was filed in this court praying for an injunction against the Secretary of War, General of the Army and others, and praying that they be restrained from carrying into effect "An Act to provide for a more efficient government of the rebel States." Motion was made to dismiss the bill for want of jurisdiction, which motion was sustained. The opinion of the court is so pertinent and conclusive that we make the following extended quotations therefrom, beginning at page 71:

"This distinction results from the organization of the government into the three great departments, Executive, Legislative and Judicial—and from the assignment and limitation of the powers of each by the Constitution.

"The judicial power is vested in one Supreme Court, and in such inferior courts as Congress may ordain and establish; the political power of the government is the other two departments.

"The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction. N. Y. vs. Conn., 4 Dall. 4; Nabod of Carnatic vs. E. I. Co., 1 Ves. Jr. 375; 2 Ves. Sr. 446, 447; Cherokee Nation vs. Georgia, 5 Pet. 1."

Again, at page 76, this Court said:

"The remaining question on this branch of our inquiry is whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul and totally abolish the

existing state government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state, by depriving it of the means and instrumentalities whereby its existence might, and otherwise would, be maintained.

"This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of Congress; which, it is charged, if carried into effect by the defendants, will work this destruction. But they are grievances, because they necessarily and inevitably tend to the overthrow of the state as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them; and the resulting threatened mischief. So in respect to the prayers of the bill. The first is that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the state, which is or may be directed, or required of them, by or under the two acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

"That these matters, both as stated in the body of the bill and in the prayers for relief, call for the judgment of the court upon political questions, and upon rights, not of persons or property, but of a political character,

will hardly be denied. For the rights, for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No cases of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

"It is true, the bill, in setting forth the political rights of the state, and of its people to be protected, among other matters, avers that Georgia owns certain real estate and buildings therein, State Capitol, and Executive Mansion, and other real and personal property; and that putting the acts of Congress into execution, and destroying the state, would deprive it of the possession and enjoyment of its property. But it is apparent that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the state, and in aggravation of it, not as a specified ground of relief. This matter of property is neither stated as an independent ground, nor is noticed at all in the prayers for relief. Indeed, the case, as made in the bill, would have stopped far short of the relief sought by the state, and its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us."

To the same effect is the case of La. vs. Texas, 176 U. S. 1, 44 L. Ed. 347. This suit was with reference to the quarantine laws adopted by the State of Texas, enforcement of which, the State of Louisiana claimed, was injurious to the business and commerce of the citizens of the State of Louisiana, wherein this court, speaking through its Chief Justice, at page 23, said:

> "Finally, we are unable to hold that the bill may be maintained as presenting a case of controversy 'between a state and citizens of another state.'
>
> "Jurisdiction over controversies of that sort does not embrace the determination of political questions, and, where no controversy exists between states, it is not for this court to restrain the governor of a state in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. Nor can we accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the state, as the remedy for that would clearly lie with the state authorities, and no refusal to fulfill their duty in that regard is set up. In truth it is difficult to see how on this record there could be a controversy between the state of Louisiana and the individual defendants without involving a controversy between the states, and such a controversy, as we have said, is not presented."

Mr. Justice Harlan concurred in the result reached, and, at pages 26-7, said:

> "Although unable to assent to the grounds upon which the court rests its opinion, I concur in the judgment dismissing the suit solely upon the ground that the State of Louisiana in its sovereign or corporate capacity cannot sue on account of the matters set out in the bill."

The case of Oklahoma vs. A. T. & S. F. Ry., 220 U. S. 276, 55 L. Ed. 465, is to the same effect. At pages 276-7, Mr. Justice Harlan, speaking for the court, said:

> "In the present case, the state seeks to enjoin the defendant company from charging more than the Kansas rates on the transportation of lime, cement, plaster, brick, stone, crude and refined oil. But the state, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates, and to compel the railway company to respect the rights of all of the people of Oklahoma who may have occasion to ship such commodities over the railway."

and then, after quoting from the case of La. vs. Texas, and approving the law as therein announced, dismissed the Bill of Complaint.

On the question of authority of this court to declare an act of Congress unconstitutional, where that is the sole purpose of the suit, the case of Muskrat vs. United States, 219 U. S. 346, was, as this court properly held, a suit to obtain a judicial determination of the constitutional validity of an act of Congress. In answer to the inquiry as to whether or not such a determination was within the judicial power of Congress, this court, speaking through Mr. Justice Day, at page 361, said:

> "We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends."

VI.

There is No Equity in the Bill.

Taking up the questions as presented, in detail, we find that by paragraph XV of the bill, the question of the constitutionality of subdivisions 18 to 22, inclusive, of Section 402 of the Transportation Act of 1920 is attacked. These subdivisions authorize the extension or abandonment of a railroad after the procurement of a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission authorizing the same where it is required or permitted by such public convenience or necessity.

Paragraph XVI of the bill raises the question of the constitutionality of Section 407, which deals with the matter of consolidation of railroads.

Paragraph XVII of the bill attacks the constitutionality of the provisions of the Transportation Act with reference to the issuance of stocks, bonds and other securities as provided for in Section 429.

Paragraph XVIII of the bill attacks the constitutionality of Section 422 of the Transportation Act which authorizes and requires the Interstate Commerce Commission to negotiate, modify, establish or adjust rates, fares, etc., so as to produce a fair return on the value of the railway property.

Paragraph XIX of the bill attacks the constitutionality of Section 416 of the Transportation Act which fixes the conditions under which the

Interstate Commerce Commission may prescribe intrastate rates fares, changes, classifications, regulations and practices so as to remove discrimination, and also the constitutionality of Section 418 of the Transportation Act which deals substantially with the same subject.

It will be observed that all of these questions of the constitutionality of the provisions referred to rest upon the same basis and that is that the provisions of the Act of Congress violate the sovereign rights of the State of Texas.

It will also be observed that the bill does not, in the paragraphs referred to or in any other paragraphs, show that the property rights of complainant have been injured or infringed upon in violation of the Constitution of the United States, so that each one of the charges made against the provisions of the Transportation Act raises questions that we have heretofore discussed, and in our views, should be determined by reason of the authorities heretofore presented in favor of the motion to dismiss.

But, if the court should consider that some of allegations in the bill are sufficient to raise questions other than political questions, then we submit Congress has the power and is authorized to enact the provisions referred to.

Power of Congress.

The power of Congress to enact the Transportation Act is derived from the consideration, as said

in the Minnesota rates cases, 230 U. S. 352, that, "That the authority of Congress extends to every part of Interstate Commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere." To the same effect is the following language used by the court in Houston E. & W. T. Ry. Co. vs. U. S., 234 U. S. 342, 351: "Wherever the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the State, and not the Nation, would be supreme within the national field." Illustrative of the principle announced in the quotations we have just made are the cases, holding that the congressional regulation of safety appliances on all railroad cars of interstate car-

riers, regardless of their use in intrastate or interstate commerce, is valid. (See Southern Railway vs. Railroad Commission of Indiana, 236 U. S. 439); holding that the protection of the Safety Appliance Act extends to all employees of interstate carriers although at the time of injury, they were engaged in purely intrastate commerce (T. & P. Railway vs. Rigsby, 241 U. S. 33); and holding that an employee after having served the appointed time in interstate commerce could not then be required to engage in intrastate commerce, since the effect of so employing him in intrastate commerce would be to render him unfit to discharge duties in interstate commerce.

When interstate and intrastate transactions are interwoven, it is for Congress to determine the question of regulation, as shown by the following extract from the Minn. Rate Case 230 U. S. 432: "If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate requirements with respect to their intrastate rates, which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it should apply. While the reference is to rates, yet the principle is obviously applicable to other matters in which interstate and intrastate transactions are interwoven. And the power of Congress to prescribe the measures of regulation comes within the providing of appropriate means for a legitimate con-

stitutional end, under the doctrine established in McCulloch vs. Md., 4 Wheaton 316, in order that the constitutional supremacy of Federal legislation may be preserved. The power of congress to enact the Transportation Act, with its various provisions, is sustained by the celebrated case of Gibbons vs. Ogden, 9 Wheaton 1, where the subject of the relation between interstate and intrastate matters was exhaustively considered. In that case, the doctrine was established that through the power of Congress to regulate commerce among the states does not comprehend that commerce which is completely internal, it does comprehend such internal commerce as extends to or affects other states.

In the case of Mondou vs. New York N. H. & H. R. Co., 223 U. S. p. 1; 56 L. Ed. 327, in which case Mr. Justice Van Devanter, at page 746, 56 L. Ed. 344, stated the power of Congress with reference to railroads, as follows:

> "The clauses in the Constitution (Art. 1, par. 8, clauses 3 and 18) which confer upon Congress the power 'to regulate commerce * * * among the several states', and 'to make all laws which shall be necessary and proper for the purpose have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:
>
> "1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its

> branches, including transportation of passengers and property by common carriers, whether carried on by water or by land. * * *
>
> "3. 'To regulate', in the sense intended is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.
>
> "4. This power over commerce among the states so conferred upon Congress is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted it its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce."

This was one of the employers' liability cases, and after the above quotation and the citation of many authorities, Justice Van Devanter said, quoting from the brief of the Solicitor General:

> "Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the Interstate Commerce Act." (Previously he had defined commerce as an act.)

In the case of Northern Pacific Railway vs. Washington, 222 U. S. 370, 56 L. Ed. 237, this court had under consideration the provisions of the "Hours of Service Law." The railway Company had permitted some of its train crew to remain on duty more than sixteen hours on a train from one point to another in the State of Washington. The case before the court was brought by the Attorney General of the State of Washington for a violation of the state law. The railway company denied liability under the state law. The trial court entered judgment for penalties of $1000.00 under that law. The question of the effective date of the Act of Congress was involved. In disposing of the main cause, however, Mr. Chief Justice White at page 378, L. Ed. 239, said:

> "But we are of opinion that this view is not compatible with the paramount authority of Congress over interstate commerce. It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject, or manifests its purpose to call into play its exclusive power. This being the conceded premises upon which alone the state law could have been made applicable. It results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once

removed from the sphere of the operation of the authority of the state."

The case of Erie Railroad vs. New York, 233 U. S. 671, 38 L. Ed. 1149, was a case involving the Hours of Service Law. In that case it was contended that the State had simply supplemented the action of the Federal government on the Hours of Service, and the State insisted on the maintenance of its rights. This court speaking through Mr. Justice McKenna, at page 683, L. Ed. 1154, in commenting on the argumeent, of the state, said:

"We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.

Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the 'hours of service' law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety, and of the cost and burden which the railroad must endure to secure it."

Trusting that the foregoing brief and argument

will be of assistance in the solution of the questions of law presented by the Bill of Complaint filed in this cause and the motions to dismiss same, we beg to submit that, in our view of the law, each of said motions should be sustaiend.

Respectfully submitted,

N. A. Stedman,

E. B. Perkins,

Daniel Upthegrove,

Solicitors for the St. Louis Southwestern Ry. Co. of Texas.